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RESTRICTIVE TRADE PRACTICES

D.R. Bradshaw

This paper attempts to deal with the development of the law in New Zealand governing the control by one or a few persons of the trade in some commodity or service. ~~It deals with monopoly and oligopoly.~~

Introduction

It seems to be generally accepted by most people that monopoly is per se evil or ~~punitious~~ pernicious. Conventional economists argue that monopoly is evil for the control of the trade allows a person both to exploit the market and to use economic resources (e.g. labour materials etc.) in an uneconomic way. Free competition between a number of people whose freedom to act is ~~unfettered~~ untrammelled by contract (or some similar restraint) it is said prevents wastage of resources and exploitation. Competition brings furthermore the best exploitation of scarce resources.

It is not the purpose of this paper to discuss the advantages or disadvantages of monopoly nor is it within the competence of the writer. However it can be asserted with some force that the facts of any particular situation may justify monopolistic practices. For an example the writer would argue that some cogent reasons exist for the conference system for liner trades, one being the ability of the shipper to guarantee that his goods will be carried where he wants. Opponents of the system believe that shipowners exploit a captive market.

The facts not only of the monopoly, but of the elasticity of the demand for goods or services, the surrounding market conditions, government control, arbitrary capricious and every changing consumer demand are all vital in determining whether monopoly serves or fails to serve the best interests of the 'consumer' public.

The fact that monopoly may enable a person to exploit a market and charge unjustifiably high prices was recognised by the law at least as early as 1602 (Darcy v. Allein /1602/ 11 Co Rep 846).

The recognition of monopoly as potentially ~~punitious~~ pernicious at that time can it is suggested be linked with the general prohibition of usury by perhaps a ~~base~~ recognition of the helplessness of many persons in the face of superior economic power.

Although the dangers of monopoly were recognised by the common law from such early times until now, the nineteenth century saw the growth of another common law doctrine that even now appears to be sacrosanct (Suisse Atlantigue case). The freedom to contract without fear of interference from any state organ is the doctrine that once recognised overpowered the common law's earlier

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recognition of the dangers of monopoly. It would be fair to say that once entrenched in the law the common law doctrine of freedom to contract effectively prohibited any development of common law rules restraining monopoly.

Common Law Principles

There are three grounds at common law for interfering with a contract which is entered into or incorporates restraint of trade. The law will interfere if the contract is unreasonable, if the means used to obtain the restraint of trade are unlawful, if the result of the agreement to restrain trade is unlawful, ~~being~~ unreasonableness.

The leading authority is Nordenfelt v. Maxim Nordenfelt /1894/ 535 where Lord MacNaughton said that 'where covenants and restraint of trade were reasonable with respect to the parties and with regard to the interests of the public the law would enforce such a covenant.'

Since that time the Courts found that a combination by shipowners to prevent another shipowner preserving or enlarging his share of the market was reasonable in the interests of the parties to the combination and was not otherwise unlawful. Mogul Steamship v. McGregor Gow /1892/ A.C. 25.

An agreement between all coalfield operators and some shipowners in South Australia for a shipowner to take all the coal on a quota system was recognised as lawful at common law. (Attorney General for South Australia v. Adelaide Steamship Co. & Others /1913/ A.C. 781). Notwithstanding the evidence that the complete control of the market thereby given caused the market price of coal to rise by nearly forty percent. The combination of the Unions to effectively prevent a rival manufacturer from marketing his products was not unreasonable in the interests of the public. Crofter Handwoven Harris Tweed v. Veitch and Others /1942/ A.C. 432.

Unreasonable restraints have included the tying for life of all farmers in a substantial area to the one dairy factory. McEllistrim v. Bally Macelligott Co-op Agricultural and Dairy Society Limited /1919/ A.C. 548. It was held, notwithstanding the evidence of the parish priest that the farmers were unreasonable and likely to give way to the temptation of competitive prices, that the covenant was not reasonable between the parties for it scarcely protected the farmer and was not in the interests of the public. Accordingly the covenant to restrain the trade would not be enforced by the Court.

A rather unusual case concerns an elderly gentleman who was paid

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a pension upon the condition that he did not enter the wool trade in competition with his former employers. Because the restraint was wider than necessary to protect the man and because it was held that such restraint was not in the public interest the contract to pay the pension was not enforceable. Wyatt v. Kreglinger and Fernau /1933/ 1 K.B. 793.

A contract was held contrary to the interests of the public and thus unenforcible where tube manufacturers provided by agreement between them that each manufacturer would make and sell a prescribed part of the total demands. The agreement provided for compensation of that manufacturer who took less than his prescribed share of the market and penalised the manufacturer who took more. The Courts easily recognised the ability of the inefficient to hide behind the agreement. Joseph Evans v. Heathcote and Others /1918/ 1 K.B. 418

The earlier cases demonstrate a number of basic principles. They include a reluctance to recognise the public interest except in extreme cases and except upon proof of the damage suffered by the public (see in particular Adelaide Steamship Co. supra). The restraint clauses concerning unlimited areas or concerning unlimited periods of time were also held to be unenforceable. No real thought was ever given to the relative bargaining strength of the parties. However the agreements were lawful but unenforceable if the restraint clause was unreasonable.

More recently the Courts have considered the relative bargaining power of the parties. Robinson v. Golden Chips 1971 N.Z.L.R. 257, Texaco v. Mulberry Filling Station 1972 1 All E.R. 513. Public interest tests in Pharmaceutical Society of Great Britain v. Dixon /1968/2 All E.R. 686 was said to be consideration of all the circumstances against the principle that free and competitive trading was in the public interest. This contrasts strangely with Adelaide Steamship Co.'s case (supra) where the dramatic increase in price to the public as a result of the restraint of trade was noted where strong and cogent proof was required of the damage to the public interest. Thus it would appear that monopoly now needs to be justified rather than the interference of the freedom of contract.

The Courts now seem more ready to find that covenants and restraint of trade are unreasonable. In one sense the leading case is the Privy Council decision in Vancouver Malt and Sake Brewing Company Limited v. Vancouver Breweries /1934/ A.C. 181. There the Court rigorously examined the adequacy of the consideration flowing from the restrained party. Their covenant in restraint seemed to be barely supportable. The Courts in the recent cases

of Petrofina (Great Britain) Limited v. Martin /1966/ 1 All E.R. 126 and Esso Petroleum v. Harper's Garage (Stourport) Limited /1967/ 1 All E.R. 699 have insisted that the true test is whether the protection sought by the party seeking to enforce the restraint is reasonable in all the circumstances. Prior to these cases (e.g. Nordenfelt (supra)) time and area appeared to be the sole considerations and apparently were decided by rule of thumb rather than any real consideration of the circumstances.

The Courts therefore seem now less concerned with the doctrine of freedom of contract and more concerned with both prevention of monopoly and protection of the individual. Nevertheless the limitations placed on the common law involvement in restrictive trade practices is seriously curtailed by the pronouncement in Nordenfelt (supra). Recent cases merely add useful but by no means powerful glosses on the original rule.

The second major weakness of the common law rule has been the remedies it offers a person who has suffered loss through a contract in restraint~~ive~~ of trade. Common law will do no more provided the means employed have been lawful than declare the contract unenforcible. Thus Lord Reid in Esso Petroleum (supra) said at 707 'one must bear in mind that an agreement in restraint~~ive~~ of trade is generally lawful if the parties agree to abide by it: it is only unenforcible if the parties choose not to abide by it'.

Unlawful Means

Clearly where unlawful means (i.e. force) are used to enforce a restraint~~ive~~ trade the Courts will hold the restraint unlawful. It may well also award damages to the Plaintiff in such a case. (Daily Mirror Newspapers v. Gardiner /1968/ 2 All E.R. 163).

Since certain practices are now rendered unlawful by Statute there seems a possibility that the injured (although not the public) party to seek redress through the Courts formerly lawful restraints of trade. Fairbairn Wright & Co. v. Levin & Co. /1915/ 32 N.Z.L.R. 1 and Capes v. Fruit Distributors Limited /1954/ N.Z.L.R. 553.

Common Law: Present Position

It has been repeated several times above that common law would not enforce unreasonable restraints of trade, provided the restraint was achieved by lawful means. It would otherwise impose no restriction upon persons seeking to combine in some restrictive trade practice. Accordingly only the legislature could successfully

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act to restrain the development of monopolistic practices. Until 1958 it appears that New Zealand's Trades Practices Legislation was virtually without teeth.

Legislative Developments to 1958

Prevention of Monopoly Act 1908 - This Act provides, in respect of agricultural implements, flour, wheat and potato, that the Governor General may lift the customs duty on those commodities if it becomes apparent that a cartel is dealing with the abovementioned products.

Trade Unions Act 1908 - This Act is important only because it rendered unenforceable agreements between trade union members. Trade unions for the purposes of the Act included not only combinations of labour but combinations of suppliers. Accordingly in Goldfinch v. Rangatiki Sawmillers' Co-op Assn Ltd (1913) 33 N.Z.L.R. 666 a combination by sawmillers was incorporated under the Companies Act (the Trade Unions Act prohibited the incorporation of unions under that Act) could not enforce the agreements it had with its members. In fact in that case a member sought to enforce the quota system with the company.

Commercial Trusts Act 1910 - The Preamble to this Act provided that it was for 'the repression of monopolies in trade and commerce'. The Act initially applied to a restricted number of basic foodstuffs (extended in 1915) and fuels. It provided for the criminal prosecution of monopolistic practices. Commercial trusts were defined to include combinations of persons who had as their object either 'controlling, determining or influencing supply, demand or price of any goods in New Zealand or any part thereof ..... creating or maintaining in New Zealand or any part thereof a monopoly in the supply or demand of any goods'. Section 3 of the Act noted a series of offences relating to the giving of illegal concessions in consideration of exclusive dealings. The offences included

(a) dealing exclusively with any person in relation to particular goods or in general;
(b) to not dealing with a specified person or class of person in relation to particular goods or in general;
(c) giving of an illegal concession for a refusal to deal with specified persons or class of persons in relation to particular goods or in general;
(d) restrictions in dealing with particular persons;
(e) concessions given for becoming a member of a commercial trust;
(f) for concessions given to a person for acting in accordance with the directions of the commercial trust.

Section 4 created a series of offences relating to the illegal refusal by persons, particularly commercial trusts, to deal with other persons.

Section 5 made it an offence for a person to conspire to monopolise wholly or partly the demand or supply in New Zealand of any goods or control the demand or supply or price of goods ~~and~~ would be guilty of ~~the~~ offence, if the monopoly or control was contrary to the public interest. only a person

Section 6 provided that it was an offence if a person charged an unreasonably high price at the direction of any commercial trust.

Section 7 provided that all members of the commercial trust would be guilty of an offence if the commercial trust sold goods at an unreasonably high price.

Section 8 provided a definition of unreasonably high prices by providing that persons were to get 'fair and reasonable' rates of commercial profit.

The first prosecution concerned the control by the Colonial Sugar Company of virtually the whole sugar trade in New Zealand. Basically the company distributed sugar through a large number of wholesalers who obtained differing rebates of prices charged in accordance with the amount of sugar they purchased. One wholesaler passed virtually the whole of its rebates onto its retailers (it also imported some sugar in competition with the Sugar Company) contrary to the practice of the others who eventually combined to form the New Zealand Merchants Association (actually a combination of regional merchants associations). The Merchants Association prevailed upon the Sugar Company to give it rebates based on a much larger quantity of sugar it was then able to take which enabled it to pass a greater rebate onto its retailers. Fairbairn Wright (the reluctant wholesaler) ~~whose~~ quantity rebate had been much reduced) ~~it~~ could. Fairbairn Wright consequently lost some of its retailers to the Merchants Association and would eventually have lost its whole trade in sugar but for the successful prosecution of the Merchants Association and the participants in the scheme. The prosecution against the Merchants Association succeeded under Section 30 of the Commercial Trusts Act 1910 which provided that an offence was committed where a concession was given to a person who undertook to become a member of a commercial trust. It was held that the Merchants Association was a commercial trust and the rebate was given to its members upon the condition that they entered that trust.

As a follow up Fairbairn Wright sued the distributor chosen by the

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Merchants Association to purchase the sugar from the Sugar Company, Levin & Co. and it was held that Fairbairn Wright had a good cause of action against Levin & Co. because Levin & Co. and the others had used unlawful means to achieve a restraint in trade. The Court held that there was no cause of action under the Act. (Fairbairn Wright & Co. v. Levin & Co. /1915/ 32 N.Z.L.R. 1)

In the early 1920's price control was removed from flour and the millers in New Zealand after a difficult season decided to impose their own system of ensuring the stability of the industry. Basically a company was formed and distributed virtually all the flour produced in New Zealand. It set prices and ensured that the millers got a return based essentially on a quota form of distribution. Return was not based on either quality or in fact the amount produced by each individual miller. Prosecution was brought under Section 3 of the Commercial Trusts Act 1910 and under Section 5. At first instance the prosecution was dismissed but the Court of Appeal allowed the Crown's appeal by a majority of three to two. The Privy Council allowed the milling company's appeal eventually. This is reported in the Supreme Court in /1925/ N.Z.L.R. 258 and the Court of Appeal in the same volume 752 and the Privy Council in 1927 A.C. at 394.

With respect to Section 3 of the Act the Privy Council said merely that the distributing company was the agent for the millers and therefore could not give the millers a concession in exchange for the exclusive dealing. In one swoop therefore Section 3 was completely emasculated.

Section 5 deals as is said above with the creation of monopoly against public interest. The Privy Council said that monopoly was not necessarily rendered illegal by this Statute and that the public interest was a matter of fact and not of law (i.e. they were not prepared to hold that the absence of competition was bad) and that there were no facts proved to establish that the monopoly was not in public interest (once again evidence had been led showing a substantial increase in price and uneven quality as a result of the formation of the distributing company). As a result of the Privy Council's decision no prosecution could be brought under Section 3 because to restrain competition a combination merely formed a company to act as its agent.

Fresh tropical fruits until 1950 were imported into New Zealand by the Government but in that year the Government granted a monopoly to Fruit Distributors Limited (a company formed for that purpose) for the importing of all fruit. In 1951 bananas were in short supply and the old quota system previously operated by the Government tended to favour old established communities rather than

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fresh developments. The company accordingly altered the quota system (in consultation with retailers) based on a period of time during which bananas had been in good supply, which period of time had occurred some very short time previously. The Plaintiff, one Capes, had apparently purchased bananas from other than his usual supplier during the prescribed period and consequently his quota was much reduced. Capes therefore endeavoured first to establish that there had been a breach of Section 4 of the Commercial Trusts Act 1910 (i.e. an illegal refusal to deal) and sued for the loss of profit. The Courts held essentially that the system that had been devised was the most equitable in view of the shortage of bananas and that Capes had received his fair share of bananas. (Incidentially imported fruit is still so distributed).

The Act could have been important because it created offences for certain monopolistic practices. However once the Crown milling case (supra) had been decided it was easy to circumvent the onerous provisions of the Act. In any event the Act had always had extremely limited operation. It is still in force.

Board of Trade Act 1919 - This Act provided first for the creation of two offences. It also gave power to the Minister to pass regulations to combat monopoly in 'the industry'.

Section 32 (3) of the Act created an offence of 'hoarding for the purpose of pushing prices of goods up'.

Section 32 (1) provided that it was an offence to sell goods for unreasonable profit. In one case under Section 32 (1) the overseas manufacturers of the Big Ben alarm clocks continually obtained large increases in the f.o.b. price of the goods. Accordingly the distributors in New Zealand lifted the prices of Big Ben alarm clocks as each increase in the f.o.b. price became known. This meant that alarm clocks bought cheaply by the distributors some months before the price increase were sold at the newer price thereby giving the distributors substantial profit. It was held by the Court that the confusion that might have ensued on the market had the distributors not been permitted to charge replacement costs against the selling price at any one time would not have been in the public interest and accordingly the profits were not unreasonably high. It is important to note that this Section was tightened later.

Regulations made by successive Ministers under the Board of Trade Act 1919 were successfully challenged on a number of occasions as being ultra vires the Minister. Essentially in Peerless Bakery v. Clinkarb (3) /1953/ N.Z.L.R. 796 it was held that the Act applied to particular industries and not to New Zealand industries as a whole

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Accordingly the regulations promulgated by the Minister to control monopoly broadly were ultra vires.

In 1956 the Industries and Commerce Act was passed which Act re-enacts the provisions of the Board of Trade Act 1919 but gives the Minister wider powers with respect to the combat of monopoly.

Control of Prices Act 1947 - Offences of hoarding and profiteering had added to ~~them~~ main two further offences under ~~this Act~~. ~~It proves~~

Section 23 of the Act provides that it is an offence to profiteer. Section 24 prohibits black marketing and Section 25 prohibited hoarding. The last offence noted in the Control of Prices Act concerns 'full line forcing'. Essentially Section 31 of the Act provides that it is an offence for a person to insist that he will not sell goods to a person without that person purchasing additional goods.

The position by 1958

Before the Trade Practices Act 1958 was enacted the major control of restrictive trade practices had been through the creation of various statutory offences. It might be convenient at this stage to list those offences. They are:

(1) illegal concession in consideration of exclusive dealing in commodities;
(2) illegal refusing to deal with a person;
(3) conspiracy to create a monopoly;
(4) black marketing;
(5) hoarding;
(6) profiteering;
(7) full line forcing;
(8) sales by commercial trusts at unduly profitable prices;

In addition it would appear that two common law ~~pleading shall not be questioned by any person.~~

~~Restraintive practices~~ offences seemed to have escaped the codification of criminal law in New Zealand in the late nineteenth century. The Offences were marketing of goods by treat and the spreading of false rumours with the intent to enhance or decry the price of goods. In 1844 an English Statute preserved these offences (which were common law offences) whilst dealing with others. The English Act was adopted by New Zealand by the English Acts Act 1854. This Statute was consolidated by the English Laws Act 1908. It would appear therefore that Section 9 of the Crimes Act 1961 did not apply.

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It is also perhaps worth noting that Section 310 of the Crimes Act 1961 by creating an offence to conspire to commit an offence under any other Act may be applicable to prohibited trade practices the commission of which is an offence.

Essentially then by 1958 the control of monopolistic practices was restricted to the criminal prosecution under fairly limited Sections.

Trade Practices Act 1958

In September last year the Government substantially amended the Trade Practices Act 1958. Because no case has yet to go to the Trade Practices Commission the amendment came into force this paper will deal with the amendment separately.

In 1958 the Labour Government passed the Trade Practices Act 1958. The preamble reads:
'An Act to make provision with respect to the prevention of trade practices deemed contrary to the public interest'.

The Act applies to trade practices both in respect of goods and services (Section 2 (2) and Section 39 of the Trade Practices Act 1958).

As originally enacted an ad hoc tribunal was created which had as its function

(a) enquiry as to whether trade practices were in the public interest;
(b) power to order the discontinuance, modification or prohibition of the repetition of any trade practice which was contrary to the public interest;
(c) power to take any other steps to control practices which are or might be contrary to public interest;
(d) power to recommend price control and the power to exercise the powers of the Price Tribunal.

(Section 8 Trade Practices Act 1958).

Effectively until the September 1971 Amendments to the Act the Trade Practices Commission and the Price Tribunal were one and the same body.

As originally enacted and until 1961 the Act provided that all agreements relating to the trade practices should be registered. This was to facilitate the discovery of trade practices, it being somewhat difficult to discover agreements between traders. The

Examiner of Trade Practices even now considers that many agreements, which would otherwise be illegal trade practices, are made at such places as golf courses. It is argued when the National Government amended the Act in 1961 that the deletion of the registration provisions would seriously weaken the Act. It is doubtful whether the Act was seriously weakened by the deletion of the provision relating to the registration of trade practices.

The Examiner acts as a kind of policeman of trade practices. The Examiner can examine any practice on receiving a complaint or upon his own motion (Section 16). He was originally deemed a Committee of Enquiry under the Industries and Commerce Act 1956 which gave him wide powers to require the production of documents and so on. If the Examiner discovered a trade practice which he thought contrary to the public interest he could require the parties to the trade practice to answer any allegations he may make of it. In other words an opportunity is given the persons carrying on the trade practice to desist from their ways (Section 16 A).

Conciliation provisions of Section 16 A were inserted in 1965. Essentially the parties to a trade practice agreement are given the opportunity by the Examiner to discuss the agreement with the Examiner and if possible settle the differences.

The Examiner whether or not the matter is settled by conciliation is obliged to report the trade practice to the Commission with his recommendation as to the course to be followed by the Commission. The Commission ~~may~~ where the parties have agreed to desist from a practice, a discretion to order an enquiry but otherwise ~~are~~ obliged to call an enquiry. (Section 18 of the Trade Practices Act 1958).

The Commission has wide powers to accept otherwise inadmissable evidence, to coerce persons into giving evidence and so forth (Section 18).

Until 1965 the two mostimportant Sections of the Act were ? Sections 19 and 20. The first Section gives jurisdiction to the Commission to entertain enquiries into specified trade practices whilst Section 20 provides first that the Commission has jurisdiction to make an order if the practice is found to be against the public interest but leaves a discretion to the Commission to widely consider the circumstances of public interest (Associated Book Sellers case /1962/ N.Z.L.R. 1058 and New Zealand Banker's Assn unreported 29 May 1970).

First the Commission has jurisdiction to hold an enquiry into the

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trade practice when the Examiner asserts that any of the following fact situations outlined below have been found. It is important to note that in the majority of cases (thirty five been to the Commission in all) the parties have admitted that the agreement was a trade practice under one of the following heads (Section 19 (2)):-

(I) Restriction of Dealings - Section 19 (2) (a) concerns a situation where either wholesalers or retailers combine to restrict the retailers or wholesalers respectively with whom they deal.

(II) Agreements or Arrangements Upon the terms of Agreements to Purchase Goods or provide services.

(i) A combination of wholesalers, combination of wholesalers retailers and contractors as to price and terms of goods and services (Section 19 (2) (b)).

Under Section 19 (2) (b) the Commission has considered two cases namely the Passenger Conference case 1963 (unreported), Fencing Materials case 1959 (unreported). The latter case concerned an agreement between a combination of wholesalers and retailers as to the prices to be charged for wire-netting. The former case concerned an agreement between Passenger Shipping Lines as to the terms of appointment of travel agents.

(ii) A combination of all selling parties as to the selling price (Section 19 (2) (c).

Under Section (2) (c) the Commission has heard the trade practices concerning the following:-

(a) the fixing of charges for services (New Zealand Banker's Association (1970) (unreported);
(b) ring tendering - Funeral Directors (1960) (unreported) glazing contracts (1959) (unreported);
(c) fixing of prices for goods (Quarry Owners (1963) (unreported) Electric Lamps (1961) (unreported);
(d) the giving of pricelists which were not necessarily binding on member - Fencing Agreement (1959) (unreported) Master Grocers /1961/ N.Z.L.R. 172.

In most cases a trade practice as described in the Act was found: but the Commission did in Masterton Bread Bakers (unreported) 1963 considered that price control virtually eliminated 'the trade practice' whereby bakers agreed not to cut prices because no competition was possible in bread because of the very low profit

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margin.

(iii) Agreement by Wholesalers to sell to Retailers if they agreed to resell at a wholesaler's stipulated price (Section 19 (2) (d).

The decision of in re Marketing of Television Receivers and Home Appliances (1966) (unreported) uncovered the agreement by television wholesalers to sell to retailers who had accepted the wholesalers stipulated prices.

(iv) An agreement between a wholesaler and a retailer whereby the retailer agreed to resell at a specified price only (Section 19 (2) (e).

III Granting of Rebates (i) An agreement by sellers/sellers and buyers that rebates would be granted to buyers for quantity or value of goods bought.

IV Refusals to sell or deal

i. An agreement by sellers not to sell to certain classes of buyers and vice versa (Section 19 (2) (g).

ii. An agreement between wholesalers or between retailers not to employ labour, machinery, etc (Section 19 (2) (h)).

iii. An unjustifiable refusal by a wholesaler to sell to a retailer. (s 19 (2)(i))

Although at least one other case under this heading has been before the Commission the facts of the two cases cited below are important.

In the re Kempthorne Prosser case /1964/ N.Z.L.R. 49 the Commission considered the situation where C.I.B.A. through its New Zealand agent Kempthorne Prosser (and wholesaler) refused to sell its whole range of ethical drugs to Sharland & Co. unless that company ceased to manufacture an ethical drug in New Zealand (which drug Sharlands could market at a considerably lower cost).

In the Animal Remedies case (unreported) 5 February 1971, the Commission considered the refusal by the companies manufacturing animal remedies to supply certain farmers' co-operative societies.

In both the cases the Appeal Authority/Commission decided the cases on the public interest grounds contained in Section 20. The

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latter case is however important for the decision seems to have prompted, at least in the minds of the opposition, the 1971 Amendment Act.

V Agreements concerning price control and the Offences Thereunder

i. Agreements by persons to withhold the supply of goods, allocated territories or markets for the sale of goods. (s 19(2)(j)

The Waikato Master Builders case (unreported) (1 July 1963) concerned the practice of builders in the Waikato area to allow only the lowest tenderer on the first tender to tender again if tenders were recalled. The lowest tenderer could not tender a price lower than the first lowest ~~tended~~ tendered price.

ii. Any practice which would constitute offences under Section 23, 24, 25 and 31 of the Price Control Act 1947. s 19(2)(k)

2(j)

VI Excessive Commission - Payment of an excessive container royalty etc. (Section 19 (2) (m)).

Exclusion from Trade Organisation - An unjustifable exclusion from a trade association. (s 19(2)(n).

The Commission considered such a complaint in the Auckland Electrical Wholesalers Assn (unreported) 1962 when an association of retailers endeavoured to join a wholesalers association for the purpose of obtaining all the wholesalers' discounts. They could not get the wholesalers' discounts otherwise. The Commission found that no unjustifable refusal had occurred because largely the group seeking admission was a retailers association and not a wholesalers association (Section 19 (2) (n)).

VII Agreements to enforce Trade Practices - Any agreement to enforce any trade practice above would also be such practice as to give the Commission jurisdiction to make an order.

VIII Situations Not Covered - The Governor General by order in Council may add to the list above if the Commission recommends such an addition.

Before dealing with the two major difficulties arising out of the list above it is worth noting that an agreement by buyers to combine, provided they buy for their own consumption, is not a trade practice under Section 19 (2) (Section 19 (3)).

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Most of the paragraphs dealing with combination of persons for the purposes of trade practices the words 'agreement or arrangement' are found. The Appeal Authority considered how broadly one interpreted 'arrangement' in Fencing Materials /1960/ N.Z.L.R. 1121, and held that an arrangement for the purposes of the Act was intended to include more than 'merely an understanding between two or more persons intended to be observed by the parties thereto but not intended to create obligations enforceable by legal proceedings'. Judge Dalglish held that where an organisation 'arranged' practice to which practice its members were bound (although not legally) to conform with, an 'arrangement' would exist.

An arrangement was also found in the Registered Hairdressers case /1961/ N.Z.L.R. 161, because the Association, having power to fix charges, did so, and even though the Association did not have power over its members to enforce the list of prices to be charged.

In neither case was any attempt made to limit the definition of 'arrangement' but rather by example the Commission or Appeal Authority tended to extend the meaning. Accordingly the decisions with respect to Section 108 of the Land and Income Tax 1954 may be of assistance in future cases.

The second important word in Section 19 (2) is the word 'substantially' which occurs in the first part of the Section. The Commission has jurisdiction to make an order under Section 19 (1) only if the practices fall substantially within the categories listed above. The word was considered in a number of cases prior to the 1965 Amendment Act but notably in the New Zealand Master Grocers Federation case /1961/ N.Z.L.R. 177. At that time fifty percent by way of turnover of the goods sold by grocers were price control goods, thirty percent were price maintained goods (the price was marked by the manufacturer) and price free goods made up the balance of the turnover. The Federation of Grocers sent out lists of all the goods whether under price control, whether price maintained or whether price control free with suggested prices for the grocers. It was found that the Federation promoted the selling by grocers of price control goods at the maximum price permitted and did the same with price maintained goods. Members of the Federation also adhered fairly closely to the suggested prices. In fact on price free goods, while a substantial adherence to the suggested price occurred 'elaborate specialling' and other devices caused some items to vary in price from time to time. It thus appeared there was a conflict in the terms of the Act because Section 19 (2) (c) provided - 'An agreement ..... to sell goods only at prices agreed

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.....' whilst the opening words of the Section provided that the Commission to find a trade practice must find that the trade practice was substantially within Section 19 (2) (c). In the Master Grocers case clearly some deviation occurred from the listed prices. This was argued by Counsel to mean that the practice did not fall within Section 19 (2) (c) for the grocers did not sell only at list prices. However the Appeal Authority found there existed 'substantially' an agreement or an arrangement to sell at listed prices.

Some argument was heard in earlier cases that where an association merely recommended a price, without binding its members, no trade practice under Section 19 (2) could be found. (Master Grocers (supra), Registered Hairdressers (supra), Fencing Materials (1959 unreported)). The argument was rejected.

In 1965 the Government passed legislation to the effect that a recommendation by a trade association to its members on prices would be deemed to be a trade practice even if the recommendation was not enforcible against the members (Section 19 (7), (8), (9)).

The Commission cannot make an order under Section 19 (1) without first finding a trade practice to be substantially in one of the categories mentioned in Section 19 (2). However before the Commission can make an order certain matters under Section 20 of the Act must be established.

Section 20 ~~as it read~~ before the Trade Practices ~~Amendment~~ Act 1971 reads as follows:-

'Trade practices deemed contrary to the public interest -

(1) For the purposes of this Act, a trade practice shall be deemed contrary to the public interest only if, in theopinion of the Commission, the effect of the practice is or would be -

(a) to increase unreasonably the costs relating to the production, manufacture, transport, storage, or distribution of goods; or

(b) to increase unreasonably the prices at which goods are sold; or

(c) to increase unreasonably the profits derived from the production, manufacture, distribution, transport, storage, or sale of goods; or

(d) to prevent or unreasonably reduce or limit competition in the production, manufacture, supply, transportation, storage, sale, or

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purchase of any goods; or

(e) to limit or prevent the supply of goods to consumers. .....'

By far the majority of the cases before the Commission have turned on questions relating to Section 20 and public interest.

A. Onus of Proof

except In ~~some~~ cases under sub-section 2 of Section 20 (which sub-section is not quoted) the burden of proof falls on the examiner who must establish if the practice complained of was against the public interest. (Fencing Materials /1961/ N.Z.L.R. 1121). Moreover the onus was upon the balance of probabilities.

Clearly however the failure to call evidence by the parties against whom the Examiner proceeds could be disastrous to that party's case (Aerated Waters (1959 (unreported)). In that case four of the six manufacturers of soft drinks in the Wellington agreed to meet regularly to discuss the prices at which soft drinks were sold. It asserted at the hearing that there were two manufacturers who did not participate in the pricing agreement, but failed to give evidence of the share that those manufacturers had of the market. As Schweppes and Coca Cola were the other two manufacturers it could be felt that the manufacturers were careless in not calling the evidence.

B Effect of Practices Unreasonable

The Examiner has nearly always relied on paragraph B,C, and D, in Section 20 (1).

Paragraphs B and C deal with unreasonable increases in profit or prices. First it should be noted that the practice of maintaining a price is not covered in paragraph B. (In Hormone Weed Killers (Appeal Authority) (1965 unreported) considerable savings had been achieved by the producers of hormone weed killers by the cutting of production costs which thereby caused higher profits. An agreement between the manufacturers meant no reduction was passed onto the consumer. No evidence was called as to the profits made on Hormone Weed Killers however and the Appeal Authority did not therefore consider paragraph C of Section 20 but held that on paragraph D the agreement unreasonably limited competition.

It will be apparent that in paragraphs B, C, and D the legislature has been extremely vague in defining what profit is unreasonable.

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Thus in the Hormone Weed Killer case (Commission unreported 1965) the Commission said profits would have to be 'undue or excessive' ~~which~~ but stated that accurate computation could not be made except on the individual facts of each case.

Under paragraph D some attempt has been made to quantify ~~quantitate of the excess~~ what is unreasonable 'reduction of competition'.

Thus the Fencing Materials case (supra) was returned by the Appeal Authority to the Commission with a direction that the Commission consider whether the trade practice did in fact unreasonably reduce competition. The Commission in unreported decision found ~~the~~ fact that fifty percent of the wholesalers abided by the agreement and twenty five percent of the retailers abided by the agreement. The Commission found that was an unreasonable reduction in competition. It made an order. The Commission also said that had the figures been forty percent and twenty percent the decision would have been the same. Incidentally on the first occasion upon the Fencing Materials case was before the Commission the Commission appeared to hold that the establishment of the trade practice under Section 1 9 (2) virtually meant it was required to hold as a matter of law the practice reduced or limited competition.

In the Master Grocers case (supra) orders were made in the case of the Auckland and Canterbury Federations only which represented eighty five percent or more of the grocers in the area. Orders were not made in the case of Wellington and Otago where the grocer parties to the agreement were somewhat less than eighty five percent.

Whatever it is obvious that considerable difficulty could arise to the Commission if it endeavoured to lay down rules as to what was an unreasonable reduction of competition. ~~Thus~~ each case must be considered on its individual facts.

C. Unreasonable, a Question of law or Fact

It will be apparent from the above discussion and from the Fencing Materials case (Appeal Authority) that the Appeal Authority considered reasonableness a question of fact.

D. Relevance of Motive

The Act prescribes that if the 'effect' of the practice was one of those found under paragraphs A,B,C,D, and E, in Section 20 then the trade practice may be deemed contrary to public interest.

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However in two decisions Passenger Conference 1963 Appeal Authority and Kempthorne Prosser /1964/ N.Z.L.R. 49 the question of motive was discussed.

In the Passenger Conference case in the first instance the Commission found that British Lines had agreed to endeavour to prevent other lines, notably Chandris, from entering the passenger trade from New Zealand to Europe. This they held was contrary to public interest under paragraph D of Section 20 (1963 unreported decision).

The Appeal Authority allowed the appeal upon the ground that the agreement had been ineffectual for the Chandris line could obtain passengers fairly easily in New Zealand and moreover there was a large surplus of passenger berths available. Accordingly said the Authority no reduction or limitation of competition had occurred as a result of the agreement. The motive therefore of the conference was quite irrelevant.

In the Kempthorne Prosser case (unreported Commission 1963) the Commission held that the refusal by C.I.B.A. to deal with Sharlands was against the public interest because it reduced competition in the drug industry. The Appeal Authority in a decision reported in [1964] N.Z.L.R. at page 49 found that competition from the point of view of the public had not been limited because the C.I.B.A. drugs could as easily be obtained from other wholesalers. However it went on to say that the Commission would not make an order prohibiting the continuance of the trade practice 'because it involved some unfairness against a reputable trader who is acting in accordance with his rights or because in some respect not mentioned in Section 20 the interests of the public might be detrimentally effected'.

In other words the petulance of C.I.B.A. and the rather unsporting retaliation it took upon discovery that Sharlands was undercutting it in some drug was not a factor for consideration by the Commission.

Discretion of the Commission

The Appeal Authority held in the Associated Booksellers case /1962/ N.Z.L.R. 1058 that the establishment of a trade practice under Section 19 (2) and the finding of an effect under Section 20 (1) did not necessarily mean that an order must be made in some way restraining or prohibiting the continuation of the trade practice. They said that while the finding of such factor was necessary to enable the Commission to make a decision it still had

a discretion under Section 20 to make the order. Accordingly much evidence has been given in the cases of additional factors which have enabled the Commission to exercise its discretion and find public interest could be as well served by the continuation of the trade practice as by the prohibition of the continuation thereof. (See inter alia Wholesale Beer Prices, 1966 (unreported), Retail Beer Prices, 1966 (unreported), New Zealand Bankers Assn, 1970 (unreported).

The Appeal Authority's reasons revolved entirely upon the construction of the words 'a trade practice shall be deemed contrary to the public interest only if ..... the effect of the practice is .....' and in particular upon the word 'only'.

On first reading it would appear that the words 'shall' and 'deemed' are mandatory. However said the Authority the word 'only' must be given a meaning; deletion of the word would certainly mean that the Commission had no discretion. Dalglish J. also rejected an argument that the word 'only' referred to the cases in which the Commission had power to make an order upon the ground that had the legislature meant that it would have used the words 'if but only if'. Accordingly said the Authority the finding of a trade practice under Section 19 (2) and the proving of one of the headings under Section 20 while necessary to the making of an order did not necessarily mean that the Commission must make an order. Accordingly the Authority said the Commission had a discretion to broadly consider the effects of the trade practice.

While the reasoning adopted by Dalglish J. was rather tortuous it is submitted that the broad interpretation placed by Dalglish J. upon this Section is appropriate.

Public Interest

No attempt is made to discuss the meaning of the words in this paper although they are vital to the Commission's decisions. Quite clearly in all of the cases the Commission has placed its own interpretation upon the words 'public interest' and has varied what it considers to be the public interest from time to time. The Commission has never drawn a rule as to what is public interest.

Collective Tendering

In 1965 the legislature prohibited collective tendering absolutely and provided that substantial fines were to be imposed on persons breaching this provision of the Act. Essentially the Act makes it an offence for wholesalers, retailers, or contractors to agree to

tender at prices and upon conditions agreed between the parties. Similarly if parties agree for all or any of them not to tender then an offence is committed (Section 23 A Trade Practices Act 1958).

Section 23 B concerns auctions and persons agreeing as to the prices they will bid. Legislature has purported to ban absolutely such practices as well.

It will be apparent that the most important wordsin section 23 A are the words 'to tender'. It will be apparent that the words have a very limited meaning. It is arguable that 'tender' covers strictly the situation where tenders are requested, as for example by the Government Stores Board for various package requirements ~~it has~~. Where however a person requires a quotation for a packaging job it is arguable no tender is given by the packagers. In the one prosecution recently Mr McLeavy S.M. held in an unreported 1970 decision that the true tender was a tender for the purposes of the Act and that all other cases involving 'quotation' were exactly the same. The decision is far from satisfactory for it had been conceded by Counsel that a 'true' tender was covered by the Act and the quote situation was not. The Magistrate considered only the true tender at depth and asserted merely in one sentence that the 'quote' situations were exactly the same. The case is Department of Industries and Commerce v. A.H.I. and U.E.B. and Others.

It is not proposed to deal further with the Trade Practices Act 1958 except when considering the effects of the 1971 Amendment Act. Before dealing with the amendments some brief mention ought to be made of the last two decisions of the Commission, namely the Bank Charges case and the Animal Remedies case.

It willbe well known that the Banks uniformally and in collusion completely altered the systems for charging current accounts in 1969. The old Inland ~~Revenue~~ Exchange was known to be inequitable and was causing the Banks some serious losses. The Examiner spent some considerable time building a case against the Banks and brought his case against them relying on Section 20 (d). It was held basically that the Bank competed in other ways than in the price of their accounts and that no reduction or limitation of competition had occurred. Moreover it was felt that the Banks were under the control of the Reserve Bank ~~with~~ and considerable restraint on through Government monetary policy. case under

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The Animal Remedies case concerned the refusal by animal remedy manufacturers to deal with certain co-operatives. These co-operatives had been formed by farmers for the purpose of obtaining wholesale prices for many of their requirements. Some 13,000 farmers were members out of nearly 60,000 farmers in New Zealand. All farmers had access to the remedies through stock and station agents and through certain long established co-operatives i.e. the Farmers' Co-operative, and more particularly through veterinary clubs (40,000 members).

Two questions came before the Commission, first the question of whether there had been an unjustifable refusal to sell or supply under Section 19 (2) (i) and secondly whether Section 20 (d) applied. On the evidence before it the Commission disposed to hold that the refusal ~~held~~ to the co-operatives was not proved to be unjustified. It said however that it need not decide the point for in its opinion paragraph (d) of Section 20 (1) was the strongest basis for its decision. The Commission found as a fact that a large number of alternative outlets already existed from which the farmer could as conveniently obtain the drenches and no reduction of competition had occurred

These cases are important for clearly in the mind of the opposition if and not the Government they prompted a review of the Trade Practices Act 1958 and as a consequence the 1971 Amendment Act followed. Certainly it appears to be the view of some members that both cases were decided the wrong way and that the Statute was not strong enough. (See Debates on Trade Practices Bill Hansard 1971 at 2664 and 2697 and 2720 and 2744, and in particularly speeches by Messrs Colman and Connelly at pages 2736, 2738 and 2739 and 2740).

Amendment

Trade Practices/Act 1971

The Trade Practices Amendment Act 1971 now provides for the splitting of the Price Tribunal and the Trade Practices Commission. ~~In view of the Act~~ the Commission may now request the Price Tribunal to make investigations if it seems desirable. ~~Moreover~~ it would appear that certain information could come to the Price Tribunal which would not usually go to the Trade Practices Commission which information could be prejudicial to the parties appearing before the Trade Practices Commission.

Section 5 of the Amendment Act provides that the Examiner, when in doubt as to whether a trade practice is contrary to public interest can refer the matter to the Commission for enquiry. Previously the Examiner had to be satisfied that a trade practice was contrary to public interest before referring the matter to the Commission. This provisions leaves the Examiner considerably more scope to

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introduce cases to the Commission and may indeed allow the Commission to get more cases before it. However it should be remembered that cases involving tade practices very often are extremely expensive and long drawn out affairs. It would appear that parties to trade practices could well be put to considerable expense in justifying the trade practice with the Examiner, being in doubt as to the public interest question, puts a case before the Commission which should not otherwise go to the Commission.

A new Section 18 A of the Act applies to trade practices under Section 19 (2) (b) (c) and (d) of the principal Act. It does not apply to situations where a resale maintenance agreement is reached between a single wholesaler and a single retailer. (Presumably this latter type of agreement is not disapproved) Moreover it does not apply to those trade practices which are made offences by the 1965 Amendment Act (Section 23 A and Section 23 B of the principal Act) or to any trade practice specifically authorised by any other enactment. For the purposes of Section 18 A recommendations made by trade associations, notwithstanding the fact that the recommendations include a direction that the recommendations are not binding on the members of the association, are deemed to be trade practices to which Section 18 A now applies. Section 18 A (3) provides that persons indulging on the trade practices mentioned above must seek the approval of the Commission to the practice. Essentially provided the practice is not contrary to Section 20 of the principal Act asamended the Commission may approve the practice upon such conditions as it thinks fit. Over three hundred applications had been received by the Examiner by the beginning of September 1972. All of the provisions concerning investigation conciliation and so forth apply to this Section. The Section also provides that practices 'approved' because no order had been made by the Commission upon investigation on a previous occasion are deemed to be approved under Section 18 A.

A new Section 18 B is inserted into the Act allowing the Commission upon the request of the Examiner to order parties who might be participating in a trade practice to furnish particulars to the Examiner of the trade practice. The Examiner of course must have reasonable grounds to believe that there is a trade practice. The parties may oppose the Examiner's application that they notify him of the practice.

Section 8 of the Amendment Act provides that the Commission can order parties to revert to the trading conditions in force prior to the time when the parties entered into the trade practice. This Section

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could provide quite a serious penalty for persons indulging in unfair trade practices.

Section 9 of the Act appears to have been enacted as a result of the Animal Remedies case. Section 19 (1) (i) of the principal Act is now amended in order to define an unjustiable refusal to sell. An unjustifable refusal now includes the situation where goods are offered by a wholesaler to a retailer at such disadvantageous terms as to discourage the retailer from buying from the wholesaler or where the wholesaler refuses to deal with the retailer on the same terms as he deals with other retailers.

Section 10 makes some substantial amendments to Section 20 of the principal Act.

Thus the situation in the Hormone Weed Killers case (supra) where prices were not reduced although costs had been reduced may now be subject to Section 20 of the Act. A trade practice may be deemed to contrary to the public interest if the practice hinders reductions in price to retailers. A provision is made that retail price maintenance agreements between a wholesaler and retailer will not be subject to the new Section 20 (1) (bb).

The initial amendment proposed to Section 20 (1) (d) intended to cast the onus of proving that a trade practice was not contrary to public interest onto the parties apparently so practicing. However after much opposition at the Select Committee hearings the Section was enacted in its new form which deems 'free and unrestricted competition to be desirable'. Essentially the persons observing the trade practice must now establish the trade practice is more desirable as free and unrestrictive competition in the public interest.

This is a quite significant amendment for it would appear possible that the Commission could have found in the New Zealand Banker's Association case that it was bound to find that price competition was desirable in the public interest.

The Commission in considering the question of unreasonableness of profits and prices is now empowered to refer the whole matter to the Price Tribunal for its investigation. (Section 20 (3)).

The Commission is now directed in specific terms as to the methods by which reduction in competition is measured. It must now have regard to the total demand for goods or the total potential demand for goods and then have regard to that portion of the total demand

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(or total potential demand) over which the reduction in competition is likely to occur. Thus for example in the Animal Remedies case the demand would be measured by the fact that twenty percent of the total users of the product were in the co-operatives. It is suggested that in that case the Commission did not consider the demand but rather considered the numbers of suppliers and the new sub-section 4 to Section 20 impliedly overrules the decision.

Section 11 of the Amendment Act provides for a definition of 'tenders' and in effect consolidates, ~~it being~~ said, impliedly, in the A.H.I., U.E.B. case (supra). Obviously a 'quote' given after consultation with competitors is now covered by Section 23 A of the principal Act and such a practice could lead to prosecution and conviction.

Section 12 provides that unless approval is given to the collective pricing arrangements by the Commission an offence will have been committed. The Section provides for certain professional persons to be exempted from the effect of this Section but not from the effect of any other Section in the Act. Section 13 provides that greater penalties can be imposed for offences under the Act.

Conclusion

It is submitted that Government adopts in this country a somewhat ambivalent and cavalier attitude towards competition. Thus the Trade Practices Act and in particular the amendments to the Act reflect an increasingly hard line by Government towards the absence of competition.

However Government appears to restrict competition by the imposition of price control on a large number of items. Government removes competition through various restrictive legislation concerning inter alia overseas companies, import licensing, tariffs and such similar legislation.

It would also appear that where the Government itself is in the market place it emasculates any other competition by restrictive legislation. The best example of this is the methods the Government has adopted to restrict competition for the railways by legislation against road and sea transport.

It can be said it is submitted with some force that the Government is interested in the 'stimulation and encouragement of competition'

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(Hon. Shelton in debate in Parliament September 1971) when it suits it.

Illegal Contracts Act
case common
law
position altered

Stevens v Allied Freightways
1956 ? 1959

rx br Bradshaw, D.R. Restrictive trade practices.